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AMERICAN LAW REGISTER.

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THE RELATION OF THE CIVIL TO THE COMMON
LAW.

ASIDE from the interest which ought, naturally, to be felt in the establishment of a periodical, through which a more familiar knowledge of the Civil Law can be obtained than is found in the books which are generally accessible to the American student, it may be further regarded as an important auxiliary in promoting a knowledge of the principles upon which the modern science of Comparative Jurisprudence is founded. We call it a science, because we believe it has its practical uses and its laws, and we call it a modern one, because so little is to be found bearing upon it in the older writers upon Law, and because, as a system, it is still so imperfect and incomplete. For a long period, there was an open antagonism between the writers upon the Common Law, and those who favored the claims of the Roman or Continental systems, and very few advocates of the former took the trouble to inquire into the merits of the codes of other states. Beyond the Decalogue, even the laws of Moses were studied or understood by few, and the wonderful system of Hindoo law, scarcely less venerable by age than that given to the Hebrews, was all but unknown to Christendom, before

¹ The following article was prepared for the American Civil Law Journal, but that publication having been suspended, the editor, J. F. BAKER, Esq., of New York, has kindly sent the article to us, with the author's consent.—ED. AM. LAW REG.

the days of Sir WILLIAM JONES. But later discoveries and reflection have taught men that no one human code or system of law is so perfect, that much valuable aid may not be derived in its behalf, from a study of other codes in supplying its defects, and suggesting improvements of which it is susceptible. Not only so, but valuable hints may often be borrowed from them, in understanding the true principle upon which many of our own laws rest. No matter how diverse may be the forms under which we may study the animal kingdom, there are certain laws running through all its departments, which enable one, by mastering them as to one class, to understand them still better, if he studies how they are illustrated by their operation in another. The anatomist of the human body throws light upon his investigations into that science, by studying the functional organizations of other animals. And to understand the philosophy of one's own language, resort must be had to the aid which he draws from the science of comparative philology. In the study of law, a similar principle may be applied to great advantage, by any one who seeks to go beyond the technical forms it assumes, while tracing the reason and spirit of its rules, by comparing the analogies and relations which subsist between systems which have prevailed in different countries, or in the same country at different periods, and at different stages of its civilization.

That there should be found resemblances between these, might naturally be expected from the fact that the subject-matter of law, wherever it prevails, must necessarily be, in many respects, the same. Something answering to a right of property is among the earliest conceptions of incipient civilization, and though the idea of an interposition by the state in favor of the personal security of the citizen is of a later growth; both are found to prevail in every nation which has made sufficient progress to have conceived the notion of a system of civil polity. To attempt to trace and follow out a comparison between the different degrees of refinement and practical excellence to which these systems have been carried by different state organizations, would open a field of inquiry too broad for an article like the present. And yet it would not be difficult to select from it, topics of a general interest, by the way of illustration, which would convey to the reader an idea of what is meant by Comparative Jurisprudence, as well as of the application which might be made of it in throwing light

upon law as a liberal science. Nor would it be necessary to run out its analogies through any considerable number of independent systems, to develop the thought and spirit which pervade them all, and underlie the forms they assume in their application to real life. Nothing could better illustrate this than the differences, and, at the same time, the analogies which may be traced between the subjects of which the Civil and Common Law took cognisance, and the rules which they adopted in respect to these. Nor can the tendency there is, in all systems, in the progress of time and civilization, to assume something like a common and prevailing form, be better shown than by the extent to which the Common and Civil Law, starting from sources so diverse, and we might perhaps say, from such opposite points, now mingle and harmonize with each other in the English or American system of jurisprudence as we meet with it in every-day life. Even in Bracton's time, many of its elements were the combined results of the two systems. And since that time, the trade and commerce of the mother country have gone back still more directly to Justinian and his code, and the modifications through which this had been passing, in its application to the business of the continent, for the rules by which their multiplied and complex relations are regulated.

It would serve our present purpose if our space allowed us to illustrate these remarks by referring at length to the laws of Real Property, in respect to which, probably, a more marked discrepancy exists between the doctrines of the Civil and the Common Law than any other of which they treat. But we must content ourselves with a brief notice only. Our system of law of Real Property, indeed, is, in many of its parts, derived solely from the English common law, whose origin, in this respect, is to be traced directly to the feudal system which came in with the Conquest. But upon this barren stock, have been engrafted many prolific branches of juridical science, the elements and germs of which were borrowed from the Roman law, the growth of which has changed, in many respects, the original character of the Common Law, and given to it susceptibilities which it wholly lacked in the rigid form under which it first sprung up out of Feudalism. Thus, we owe to the conceptions and ideas of the Civil Law, our entire system of Uses and Trusts, and much of the doctrine of Ease-

ments and Servitudes, which hold such important places in our modern system of the law of Real Property.

But in order to understand and apply the tests which distinguish the two systems from each other, in relation to landed estates, we ought first to inquire into the rules by which they discriminated between realty and personalty, in the matter of property, together with the tenure and mode of disposing of lands and goods which are now so distinctly recognised in the Common Law.

The property in land and the mode of acquiring it, under the Common Law, forms a distinct study from that which relates to goods. Whereas, both by the Roman and the modern continental codes, there is nothing in the term "*bona*" covering both, to distinguish the one from the other. The inquiry has, sometimes, suggested itself, whether and how far this difference has affected the national characteristics of the countries in which it has prevailed. That it has exerted an influence in that direction, in what we see of the England of to-day, can hardly be doubted. Among the Jews the tenure of their lands had a most marked effect upon the character and habits of that peculiar people. The provision in their laws by which the lands in the state reverted to the original families to whom they had been at first allotted, every fifty years, fixed them as a people to the soil, and prevented that accumulation of wealth into a few hands which begets social inequalities, and the jealousy and disaffection which are apt to arise between more or less favored classes. On the other hand, the Common Law doctrine of tenure and inheritance, and the complicated and artificial system of *estates* into which the ownership of lands in England were early subdivided, has, doubtless, had its influence in perpetuating the feudal notions of property and habits of thought which became fixed and rooted before the statute of *Quia Emptores*, in the time of Edward I., made lands freely alienable. If now, we inquire what distinction the Roman law made between property in land and that in goods, we find, in the first place, that by the law of succession, which was a favorite institution of Roman jurisprudence, no discrimination whatever was made between real and personal estates, nor were any rights of primogeniture or preference of males over females recognised. The mode of acquiring and transferring titles to bonds, known to the ancient Civil law as "*Mancipation*," and once universally in use under it, applied alike to lands and slaves and to ordinary beasts of burden, which were

called from this circumstance, "*res mancipi*." Nor was there any difference in the mode or effect of making these transfers, unless it might be in the symbols by which the *possession* of the thing to be transferred was passed from one to another. There was a distinction, indeed, recognised between things movable and things immovable, but it applied chiefly to the length of time necessary to gain a title to them by possession, by what was called "*Usucapion*," which answered, in many respects, to our idea of prescription. In the earlier periods of the Roman law, it required one year's possession of immovables, and two of movables, to gain a title thereby, but at and after the time of Justinian, these periods were extended to three years in case of movables, and ten, and in some cases, twenty years in respect to immovables.

Another distinction between the Roman and English Common Law in regard to the title and ownership of lands, is the feudal and allodial ideas of property therein. The feudal theory recognised a double property or ownership, one that of a superior lord over the fief, the other that of a subordinate tenant, holding from or under him. The free lands of the Romans, or those known as allodial to the feudists, on the contrary, owed no duty and paid no services to any superior, and were held by free and absolute titles. The owner, in the eye of the law, had a "*plenum dominium*," over what he rightfully claimed as his own; in the words of the law, "*ex jure Quiritium*." The same form and the same phrase was used, whether it was to pass a title to a Roman farm or to the slave or the ox of the Roman farmer. No Roman lawyer ever undertook to comprehend the subtleties of seisin, or puzzled his brain to reconcile the doctrine of "*scintilla juris*," of which we read in *Chudleigh's Case*, with common sense. The old fashioned way of evidencing a sale of lands by the presence of five witnesses, besides the *libripens* or man with the scales, to weigh the copper money, and pronouncing in their hearing a formula, every word of which must be exactly recited and every motion gone through with in its proper order to give it effect, had given place, at the time of Justinian, to a formality of the simplest character, consisting of a mere delivery of the thing sold by the vendor to the purchaser, without any feudal requirement that this should be done in the presence of one's peers, or be transacted in a Baron's court.

In tracing how far our own law in respect to holding and conveying lands, coincides with either the early or later phase of

the Roman law, or with the Common Law of England, as it existed before or after the time of Henry VIII., we find that we retain the feudal idea of seisin, although we discard the feudal doctrine of tenure, and hold our estates by a title as free and allodial as any ever known to the Civil Law, while we retain the phraseology and much of the machinery of the ancient Common Law, modified, indeed, and shaped by the changes which the statute of Henry wrought in the law as it then stood, by wedding a feudal seisin to a Roman use, in a vain attempt, by such a union, to destroy them both by fusing them into one simple homogeneous entity, dispensing with both the feudal livery of seisin and the formal tradition of the Roman law. The seeming confusion to which this union led, in the matter of creating present and future or executory interests in lands, was partially obviated by subsequent statutes requiring the execution of deeds as a means of creating estates in freehold, and still more effectually, in our own country, by requiring them to be registered. And now, there are able writers in England who, to remedy still further this confusion, are gravely advocating the feasibility and importance of obliterating the line which separates the legal and equitable qualities of estates in lands, and reducing the complicated science of conveyancing to the simple properties of a contract. Such a change would, indeed, be a transformation about as difficult to reconcile and adapt to practical use, by either courts or bars trained to the modern law of real property, as it would be to contrive a form of "strict settlement," by which the stock upon a farm, or the goods in a warehouse might be conveyed through successive ownerships by way of future and contingent limitations; or it would have been for a Roman conveyancer to have originated that subtle conceit which creates new and independent estates out of the severed parts of prior ones, through the magic legerdemain of a Power or a Shifting Use.

But aside from the practical aids which the Common Law has borrowed, from time to time, from the Civil, in adapting itself to the changes which time has been working in the condition of the Anglo Saxon races, it owed far more to the Civil Law for the influences which brought Feudalism into harmony with social progress, than was generally understood, until, with the characteristic patience and research of a German student, Mr. Güterbock made it known, by his work entitled "Bracton and his

relation to the Roman Law, a contribution to the history of the Roman Law in the Middle Ages." This work is now accessible to the public, through an excellent translation by our countryman Brinton Coxe of the Philadelphia Bar, and shows that this Nestor of English writers upon the Common Law was largely indebted for much of his materials, to works upon the Civil Law and especially to that of Azo of Bologna. And in this way, it is easy to see how coincidences may have grown up, as to many things, between these two systems, which are still found upon comparing them.

Another means, but less obvious perhaps, by which the Common Law must have imbibed many of the principles, and much of the spirit of the Roman Law into its constitution, which it still retains, was the conquest of the Britons by the Roman legions, and the subjection for centuries of a large proportion of the Island to the dominion of the Cæsars, which must have left its impress upon the popular habits of thought. Indeed there are ingenious writers of the modern school, who find, as they believe, a cause for the superior early thrift, social order and domestic comfort of the English over their Irish neighbors across the channel, in the general prevalence of Roman laws and institutions over these portions of England of which Ireland never shared the benefits.

When speaking, however, of the claims of the Civil Law upon the attention of the student, we would not be unmindful of the distinction there is between what is necessary to become a good practitioner; and what is required of a sound and finished lawyer. Many a practitioner has achieved great success in his profession as a skilful manager of causes, and accumulator of money, who had never any but the vaguest idea of what the Civil Law is. On the other hand, any one must readily see how unreasonable it would be to expect that a lawyer in practice, in our country, could find time or opportunity to master a science so vast and varied as the Civil Law must be. And yet it cannot fail to help a student of the American law, to trace the coincidences between these two systems. He learns, among other things, the curious psychological fact, that nations, at about the same stage of civilization, have codes of law in many respects similar, if not identical. It serves, moreover, to show how the growth of centuries of legal culture in Rome was gathered up and analyzed by the processes

of codification to which it was subjected, and the underlying principles upon which her jurisprudence, as a system rests, became general in their application, and separated from the accidental facts and surrounding circumstances which first brought them as principles of universal law, to the cognisance of her jurists, and helped to build up that wonderful system which displaced the partial codes and customs of different races, and by means of which, in no small degree, Rome, in the language of another, became "the vessel in which the treasure of ancient civilization was preserved, till the nations of modern Europe were ready to receive it." When we remember, too, what an exhaustless fountain this has been, to which these nations have resorted from time to time, to supply the wants which their higher and broader civilization has developed, its importance, as a liberal study, can hardly fail to be appreciated.

This may be less palpable to a casual observer, when speaking of the law of Real Property, than when applied to other departments of the Common Law. And the subject, therefore, may be thought to be of less interest than others which might have been selected. But our purpose will have been answered, if what is here said shall awaken a desire in the student of the Common Law to pursue and trace out the analogies that exist between the elementary principles which enter into both these systems of refined and comprehensive jurisprudence.

We might, to this end, go more into detail than we have, thus far done. But the only occasion there would be for doing this, would be to remind the student how many of the subjects of which the text books of the Common Law treat, have their origin more or less directly in the laws and institutions of Rome. We have already spoken of the doctrine of *Trusts* and *Servitudes*, which form a part of the elementary study of the Common Law, although antedating it in point of time. We might add to these, *Mortgages*, so familiar to every man of business, for whose origin and history we should have to go back to the Jewish, as well as the Roman codes; or we might show how the Roman *Usucapion*, older, as it was, than the Twelve Tables themselves, grew up, at last, into the Prescription of the Common Law of to-day. But our limits are already transcended, and we can only venture to allude to one other feature of the Common Law, which illustrates how near the gravity of one of its judicial proceedings, when looked upon, from

the outside, came to the ridiculous character of a farce, when it converted the "*cessio in jure*" of the civil law, into the dramatic extravaganza of a "Common Recovery."

If then, in conclusion, we have not misapprehended the points of contact at which the Common and Civil Law meet and occupy a common ground, we can add little to the suggestion already made, that to the student of the Common Law, who wishes to master it as a liberal science, a knowledge, to a certain extent, at least, of the Civil Law, may be regarded as well nigh indispensable. And if this may be true of England, it must be still more so of our own country, whose juridical notions, if not her laws themselves, are in a measure the outgrowth of every civilization and form of government which are found in the old world. With at least two millions of the Teutonic race scattered through the west, whose ideas are based upon codes of law, borrowed, more or less directly from the Civil Law, and with other large regions originally held by people of a Latin stock, among whom the memory still lingers of the Partidas and Code Napoleon, and with all these discordant elements now passing through the slow processes of assimilation by which the American people are to become ultimately blended into one nationality, it is difficult to exaggerate the importance to the jurist and the statesman, of understanding those various systems of jurisprudence, so far as they have been tested and applied in the experiences of actual life, and of knowing how to select from them whatever is best suited to the condition of a free, active and progressive people, whose law borrows its force as well as its character from the habits of thought which are cultivated and prevail in the community in which it is administered. We meet, indeed, at every turn, traces of that conservatism, for which the law has always been proverbial. But the changes through which it has been passing in England and our own country, during the last fifty years, remind us that it is itself subject to the laws of progress, and sensitive to the spirit of reform. Its rigid technicalities have been yielding to a more enlightened spirit of free interpretation, and jurisprudence as a science, is becoming less and less hedged in by the artificial lines of prescriptive forms, or the force of antiquated traditions. The movement is worthy of the age in which it is being carried forward, and whatever helps to sustain it, deserves the countenance and aid of every one who either frames, interprets or administers a people's laws.

EMORY WASHBURN.